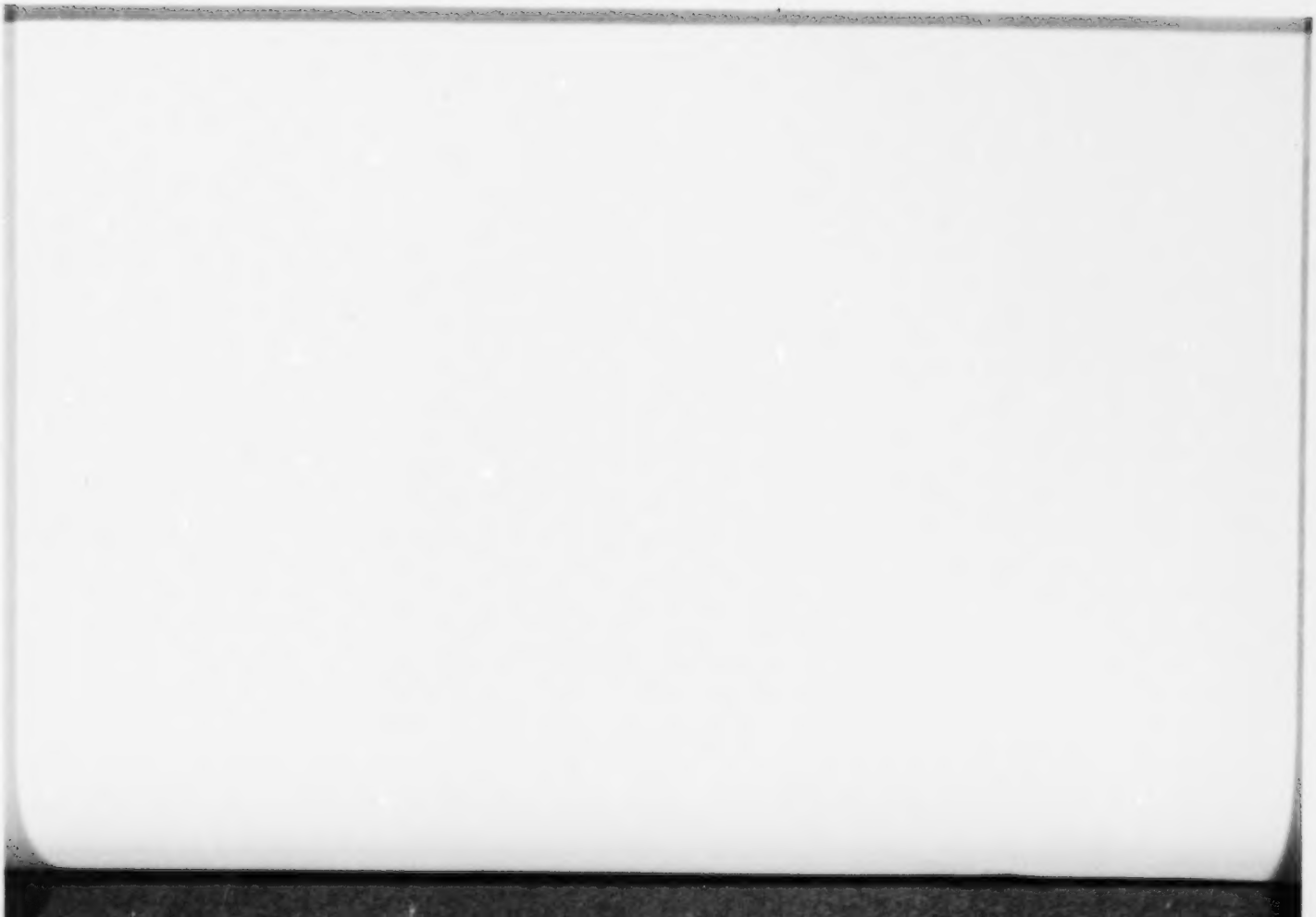

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No. 1451

In the Supreme Court of the United States

OCTOBER TERM, 1945

SAX AND ROSE ELIZABETH BOEHME, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	6
Conclusion	17
Appendix	18

CITATIONS

Cases:	
Berlin v. *Commissioner*, 42 B. T. A. 668	10
Browning Co. v. *Commissioner*, 6 B. T. A. 914	10
Commissioner v. *Affiliated Enterprises*, 123 F. (2d) 665	10
Commissioner v. *Celanese Corp.*, 140 F. (2d) 339	16
Commissioner v. *Raphael*, 133 F. (2d) 442, certiorari denied, 320 U. S. 735	16
De Nobili Cigar Co. v. *Commissioner*, 143 F. (2d) 436	16
Ehrlich v. *Higgins*, 52 F. Supp. 805	10
General Aniline & Film Corp. v. *Commissioner*, 139 F. (2d) 759	16
Goldsmith v. *Commissioner*, 143 F. (2d) 466, certiorari denied, 323 U. S. 774	16
Hazeltine Corp. v. *Zenith Radio Corp.*, 100 F. (2d) 10	10
Kaltenbach v. *United States*, 66 C. Cls. 581	10
Marton v. *Commissioner*, 47 B. T. A. 184	10
Sabatini v. *Commissioner*, 32 B. T. A. 705	15
Sabatini v. *Commissioner*, 98 F. (2d) 753	10, 15
Tesra Co. v. *Holland Furnace Co.*, 73 F. (2d) 553	9
Western Union Tel. Co. v. *American Bell Tel. Co.*, 125 Fed. 342	9
Statutes:	
Income Tax Act of 1913, c. 16, 38 Stat. 114, Sec. II D	14
Internal Revenue Code:	
Sec. 119 (26 U. S. C. 1940 ed., Sec. 119)	11, 13, 16, 18
Sec. 143 (26 U. S. C. 1940 ed., Sec. 143)	7, 10, 19
Sec. 211 (26 U. S. C. 1940 ed., Sec. 211)	6, 7, 8, 10, 19
Sec. 212 (26 U. S. C. 1940 ed., Sec. 212)	20
Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 8	14
War Revenue Act of October 3, 1917, c. 63, 40 Stat. 300:	
Sec. 1205	14
Sec. 1211	14
Revenue Act of 1918, c. 18, 40 Stat. 1057:	
Sec. 221	11
Sec. 256	14

Statutes—Continued

	Page
Revenue Act of 1921, c. 136, 42 Stat. 227:	
Sec. 217	11
Sec. 221	11
Revenue Act of 1924, c. 234, 43 Stat. 253:	
Sec. 217	11
Sec. 221	11
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 217	11
Sec. 221	11
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 119	11, 16
Sec. 144	11
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 143	11
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 119	11
Sec. 143	11
Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 119	11
Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 119	11
Miscellaneous:	
3 Bouvier's Law Dictionary (Rawle's Third Revision) 2975	9
H. Conference Rep. No. 172, 65th Cong., 1st Sess., pp. 52–53 (1939–1 Cum. Bull. (Part 2) 70)	14
H. Rep. No. 767, 65th Cong., 2d Sess., p. 35 (1939–1 Cum. Bull. (Part 2) 86)	15
H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9–10 (1939–1 Cum. Bull. (Part 2) 667)	13
I. T. 2735, XII–2 Cum. Bull. 131–135 (1933)	12
S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21, 23 (1939–1 Cum. Bull. (Part 2) 678)	13
Treasury Regulations 45, Art. 362	12
Treasury Regulations 69, Art. 362	12
Treasury Regulations 74, Art. 762	12
Treasury Regulations 77, Art. 762	12
Treasury Regulations 86, Art. 143–2	12
Treasury Regulations 94:	
Art. 143–2	12
Art. 211–7	12
Treasury Regulations 101:	
Art. 143–2	12
Art. 211–7	12
Treasury Regulations 103:	
Sec. 19.119–5	20
Sec. 19.143–2	11, 12, 21
Sec. 19.211–7	22
Sec. 19.212–1	23
Sec. 19.213–1	23
Webster's International Dictionary	9

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1151

SAX AND ROSE ELIZABETH ROHMER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 11–22) are reported at 5 T. C. 183. The opinion of the Circuit Court of Appeals (R. 31–39) is reported at 153 F. (2d) 61.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 3, 1946. (R. 40.) Petition for rehearing was denied January 25, 1946. (R. 55.) The petition for a writ of certiorari was filed April 24, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the $10,000 paid in two lump sums for the use of taxpayer's story "The Island of Fu Manchu" for magazine and newspaper publication in serial form in the United States and Canada is "fixed or determinable annual or periodical gains, profits, or income" within the meaning of Section 211 (a) (1) (A) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are set forth in the Appendix, *infra*, pp. 18–23.

STATEMENT

The facts found by the Tax Court (R. 12–15) are as follows:

The taxpayers, husband and wife, are British subjects and reside in Little Gatton, Reigate Hill, Surrey, England. During the taxable year they were nonresident aliens not engaged in a trade or business in the United States and had no office or place of business in the United States. On June 14, 1941, they filed a joint nonresident alien income and defense tax return for the calendar year 1940 with the Collector of Internal Revenue at Baltimore, Maryland. Sax Rohmer will hereinafter be referred to as the taxpayer. (R. 12.)

Paul R. Reynolds & Son is a literary agent, engaged in business in the United States, and during the year 1940 was the exclusive literary agent of taxpayer in this country. In 1940 the agent received a story entitled 'The Island of Fu Manchu'' from taxpayer, and secured an offer from McFadden Publications, Inc., for the use of the first and second American and Canadian serial rights. The total consideration paid for the serial rights was $10,000 and was represented by two checks, one in the amount of $1,000 and the other in the amount of $9,000. These amounts, respectively, were paid to Paul R. Reynolds & Son, as agent, on July 10, 1940, and August 21, 1940. The only written contract between McFadden Publications, Inc., and taxpayer or his literary agent, covering the manuscript in question, is that contained above the endorsement of the two checks received in payment for the manuscript. (R. 12–13.) The rights to the manuscript granted to McFadden Publications, Inc., which are contained in the above endorsement to the checks, consist of the following (R. 13):

> The payee represents he is agent of the Author named below, and, as agent, acknowledges full payment for manuscript(s) entitled
>
> THE ISLAND OF FU MANCHU
>
> By Sax Rohmer
>
> With authority to copyright and with privilege of change of title; and warrants

and represents that such composition is original and if not fiction, also factually true, and that the author above is the sole owner thereof. Any alteration hereof makes this check void.

(a) With 1st and 2nd American & Canadian serial rights and right to export copies and republish in foreign editions of publication. No prior publication anywhere in the world except by special written agreement. No book publication before magazine publication is completed.

INCLUDING THE RIGHT TO ADVERTISE, DESCRIBE OR DRAMATIZE THE SAID STORY AND/OR TO PRESENT THE SAME IN DRAMATIC OR OTHER FORM AS PART OF LIBERTY RADIO BROADCAST.

By the first and second serial rights is meant the right to magazine and newspaper publication of the story in serial form. The story was licensed to McFadden Publications, Inc., for publication in Liberty Magazine in the United States and Canada. The record does not show whether the story was ever in fact published in serial form by Liberty Magazine in the United States or Canada. The average Canadian circulation of Liberty Magazine for a period of one year succeeding July 1, 1940, was approximately seven percent of the combined circulation in the United States and Canada. (R. 14.)

The rights to the story subsequently published in book form, produced as a motion picture, or as a stage production, were retained by taxpayer.

The book publishing rights were subsequently licensed to Doubleday Doran & Company, Inc., under a royalty agreement. (R. 14.)

The arrangement of Paul E. Reynolds & Son with taxpayer was that it should act as taxpayer's exclusive agent for the sale in the United States and Canada of his literary works. It was understood that the agent would be entitled to 10 percent of the gross amount received from McFadden Publications, Inc., as a commission for services. This commission was the customary amount paid to literary agents. It was the practice of the agent to deposit the entire proceeds in its own bank account and thereafter, from time to time, to remit 90 percent of the proceeds to taxpayer. (R. 14.)

Income tax on the $10,000 received from McFadden Publications, Inc., was paid at source through withholding and the $10,000 was reported as income in 1940 by taxpayer and his wife, except that they deducted from gross income the commissions paid the literary agent during the year 1940 and also deducted 7 percent of the $10,000 as income allegedly received from sources outside the United States. (R. 14–15; see also, R. 7.) The Commissioner denied these deductions and determined a deficiency of $77.61. (R. 14–15.) On petition for review by the Tax Court, taxpayer and his wife claimed they were entitled to a refund of $1,797.50 on the ground that none of the

$10,000 received from McFadden Publications, Inc., was taxable. (R. 12.)

The Tax Court held that the $10,000 constituted a lump sum royalty and was taxable under Section 211 (a) (1) (A) of the Internal Revenue Code to the extent that it was derived from sources within the United States; that there was no basis in the record for a determination that any part of the $10,000 was derived from sources outside the United States; and that taxpayer is not entitled to a deduction for the ten percent commission he paid his United States agent. (R. 15–22.) On appeal, the Circuit Court of Appeals affirmed this decision *in toto*. (R. 31–39.) The taxpayer now claims only that the $10,000 is not taxable under Section 211 (a) (1) (A) of the Internal Revenue Code and has apparently abandoned his other contentions. (Pet. 2–3.)

ARGUMENT

Taxpayer contends that the $10,000 McFadden Publications, Inc., paid for the American and Canadian serial rights to the story "The Island of Fu Manchu" is not taxable to him under Section 211 (a) (1) (A) of the Internal Revenue Code (Appendix, *infra*) as "other fixed or determinable annual or periodical gains, profits, and income" because the $10,000 was paid in two lump sums rather than annually or periodically (Br. 5–16.) The *amici curiae* briefs filed in this case make a similar argument. The merits of the case hinge

on an interpretation of the language of Section 211 (a) (1) (A). Contrary to taxpayer's assertions that the decision below threatens "inextricable confusion" (Br. 5, 13) and involves an important question which should be settled by this Court (Pet. 2–3; Br. 17; see also brief of Roswell Magill and George G. Tyler, *amici curiae*), the interpretation placed on the statutory language by the court below is supported, we submit, by the full context of the statute, its legislative history, administrative practice, and prior decisions.

For the most part, taxpayer's argument is directed toward a point over which there is no dispute. He argues that by Section 211 (a) (1) (A) Congress intended to tax only income which had previously been subject to withholding under the substantially identical provision which has been contained in the various revenue acts since 1918 and is now Section 143 (b) of the Internal Revenue Code (Appendix, *infra*). (Br. 6, 9, 11, 16.) The court below did not hold to the contrary; it specifically stated that the coverage of Section 211 (a) (1) (A) as to taxability is "the same as that of the withholding provision." (R. 33.)

Taxpayer's assertion that the decision below deletes the words "annual or periodical" from Section 211 (a) (1) (A) (Br. 10, 13, 14–15; see also *amici curiae* briefs) misconstrues the basis of the decision below. Section 211 (a) (1) (A) taxes

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"dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income" derived from sources within the United States. The statute does not state that only such gains, profits, and income as are actually paid periodically are taxable. Hence, deletion does not necessarily follow from the failure to give the statute such an interpretation. The pertinent inquiry is whether the Circuit Court of Appeals was correct in its conclusion that the phrase "other fixed or determinable annual or periodical gains, profits, and income" is "descriptive of the nature or type of income, regardless of the actual manner of payment."[1] (R. 34.) The Tax Court had placed the same interpretation on the statute. (See R. 18.)

The context of Section 211 (a) (1) (A) is in accord with that interpretation, with consequent taxability in the instant case. The statute expressly names certain types of income which are

[1] Even if the statute were deemed to cover only income of a recurring nature, it would seem that taxpayer would nevertheless be taxable on this $10,000. The Tax Court found that Paul R. Reynolds & Son was the exclusive literary agent in this country in 1940 for taxpayer's literary works and that it was the agent's practice to remit 90 percent of the proceeds to taxpayer from time to time. (R. 14.) While the record does not reveal how many stories taxpayer's agent handled for him, the arrangement was obviously one where taxpayer received income periodically through his United States agent.

taxable, such as rents and compensations, and then adds the phrase "or other fixed or determinable annual or periodical gains, profits, and income." Since rents and compensations are explicitly covered, it can hardly be assumed that they are not taxable if paid in a lump sum. The phrase "or other fixed or determinable annual or periodical gains, profits, and income" simply means that other gains, profits, and income of the same type as those expressly named are also taxable. And, since the enumerated types consist of income which is *usually* paid periodically, it must follow that that is the type of income Congress intended to include, regardless of the manner of actual payment in a particular case. Royalties are of that type and the $10,000 paid by McFadden Publications, Inc., for the American and Canadian serial rights to "The Island of Fu Manchu"—a limited use, since taxpayer retained motion picture, book publishing, and stage production rights—was a royalty. Like rent and compensation for services, royalties are paid for the use of an article, *usually* at a set or determinable amount periodically. 3 Bouvier's Law Dictionary (Rawle's Third Revision) 2975; Webster's International Dictionary; *Tesra Co.* v. *Holland Furnace Co.*, 73 F. (2d) 553, 554 (C. C. A. 6th); *Western Union Tel. Co.* v. *American Bell Tel. Co.*, 125 Fed. 342, 348–349 (C. C. A. 1st). A lump sum payment may also be a royalty if it is paid by a

licensee to a licensor for the use of an article. *Sabatini* v. *Commissioner*, 98 F. (2d) 753 (C. C. A. 2d); *Hazeltine Corp* v. *Zenith Radio Corp.*, 100 F. (2d) 10, 16–17 (C. C. A. 7th); *Ehrlich* v. *Higgins*, 52 F. Supp. 805 (S. D. N. Y.); *Marton* v. *Commissioner*, 47 B. T. A. 184; cf. *Berlin* v. *Commissioner*, 42 B. T. A. 668; *Kaltenbach* v. *United States*, 66 C. Cls. 581; *Browning Co.* v. *Commissioner*, 6 B. T. A. 914. As in the case of rent and compensation, the purpose for which the payment is made and not the manner of payment is the determining factor. *Commissioner* v. *Affiliated Enterprises*, 123 F. (2d) 665, 668 (C. C. A. 10th).

The legislative history of Section 211 (a) (1) (A) indicates that Congress interpreted the statute as simply defining the nature or type of income subject to tax, irrespective of the manner of actual payment; assumed that lump sum royalties were covered by the withholding provision, now Section 143 (b) of the Internal Revenue Code; and intended royalties to be covered by Section 211 (a) (1) (A), through which withholding and taxability were made coterminous in 1936 as to nonresident aliens not engaged in a trade or business in the United States and not having an office or place of business here. Until 1936 nonresident aliens were taxable on all income from sources within the United States and from 1921 on the various Revenue Acts specifically defined income from sources within the United States as including interest,

dividends (with exceptions), compensation for personal services, gain from the sale of real and personal property under certain circumstances, and rentals and royalties from any interest in property located in the United States, "including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property."[2] From 1918 to 1936 the Revenue Acts successively contained a provision, substantially identical to the present Section 143 (b), for withholding of the tax on all "rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income" of a nonresident alien.[3] In interpreting this withholding section, Treasury Regulations from 1924 to 1936, like Article 19.143–2 of Treasury Regulations 103, promulgated under the Internal Revenue Code (Appendix, *infra*), provided that "fixed or determinable annual or periodical income" included royalties but not income derived

[2] Section 217 of the Revenue Acts of 1912, c. 136, 42 Stat. 227; 1924, c. 234, 43 Stat. 253; and 1926, c. 27, 44 Stat. 9; Section 119 of the Revenue Acts of 1928, c. 852, 45 Stat. 791; 1934, c. 277, 48 Stat. 680; 1936, c. 690, 49 Stat. 1648; and 1938, c. 289, 52 Stat 447; Section 119 of the Internal Revenue Code.

[3] Section 221 (a) of the Revenue Acts of 1918, c. 18, 40 Stat. 1057; 1921, 1924, and 1926; Section 144 (b) of the Revenue Act of 1928; Section 143 (b) of the Revenue Acts of 1932, c. 209, 47 Stat. 169, and 1934.

from the sale of real or personal property.[4] In 1933, in interpreting the taxing section, the Treasury Department held that a lump sum payment for the first and second American and Canadian serial rights of an author's output of stories was a royalty and not a sale of property. See I. T. 2735, XII–2 Cum. Bull 131–135 (1933). In 1936, when Congress changed the law to make taxability

[4] Article 362 of Treasury Regulations 45, promulgated under the Revenue Act of 1918, and of Treasury Regulations 69, promulgated under the Revenue Act of 1926; Article 762 of Treasury Regulations 74, promulgated under the Revenue Act of 1928, and of Treasury Regulations 77, promulgated under the Revenue Act of 1932; Article 143–2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934; Articles 143–2 and 211–7 (a) of Treasury Regulations 94, promulgated under the Revenue Act of 1936, and of Treasury Regulations 101, promulgated under the Revenue Act of 1938.

While in one respect these Regulations seemed to contemplate periodic payment, they provided (*ibid.*):

"That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical."

That the manner of payment was deemed of no importance is evidenced by the fact that since 1936, when dividends were added to the statute, the Treasury Regulations have provided that the statute includes all distributable trust income from sources within the United States, *whether distributed or not.* Article 143–2 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, and of Treasury Regulations 101, promulgated under the Revenue Act of 1938; Treasury Regulations 103, promulgated under the Internal Revenue Code, Sec. 19.143–2.

and withholding coterminous, the Senate and House Reports on Section 211 reflected that Congress intended to relieve nonresident aliens of the tax only on capital gains, including so-called gains from hedging transactions, because it had been found impossible to collect effectually, and believed that this exemption would result in additional revenue from transfer taxes, from the income tax in the case of persons carrying on the brokerage business, and by the inclusion of dividends previously exempted. S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21, 23 (1939–1 Cum. Bull. (Part 2) 678), set forth in part at pages 25–26 of taxpayer's brief; H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9–10 (1939–1 Cum. Bull. (Part 2) 667). It seems reasonably apparent, therefore, as the court below concluded (R. 33), that Congress intended nonresident aliens to remain taxable on all royalties as defined in Section 119 (a) (4) of the Internal Revenue Code (Appendix, *infra*).

It further appears that Congress has attached little, if any, importance to the words "annual or periodical" contained in these statutes. In the House and Senate Reports on the 1936 change, just mentioned, the statutory language was referred to as covering "fixed or determinable income." (See R. 35.) This "abbreviation of the full statutory language," as taxpayer terms it (Br. 10), is consistent with the full context of the statute, as we have already shown, and re-

flects the Congressional interpretation of the statutory language. That interpretation is one which was reflected by Congress as far back as 1917 with respect to a provision which taxpayer erroneously assumes (Br. 10–11) is to be interpreted differently from Section 211 (a) (1) (A) and the withholding provision. Prior to 1917 there was a withholding provision applicable to citizens and nonresidents alike. See Section II D of the Income Tax Act of 1913, c. 16, 38 Stat. 114; Section 8 (d) of the Revenue Act of 1916, c. 463, 39 Stat. 756. Section 1211 of the War Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, provided for information at source in lieu of withholding at source as to citizens on "interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable gains, profits, and income." See H. Conference Rep. No. 172, 65th Cong., 1st Sess., pp. 52–53 (1939–1 Cum. Bull. (Part 2) 70). At the same time, by Section 1205 the withholding provision was retained as to nonresident aliens and covered the same enumerated types of income and "other fixed or determinable *annual or periodical* gains, profits, and income" [italics supplied]. Despite the omission of the words "annual or periodical" from the information at source provision, the House Report on the 1918 Revenue Act, which also omitted the words "annual or periodical" from the information at source provision (Section 256), stated that the 1917 Rev-

enue Act substituted information at source for collection at source "of any fixed or determinable *annual or periodical* sum" [italics supplied] in excess of $800. H. Rep. No. 767, 65th Cong., 2d Sess., p. 35 (1939–1 Cum. Bull. (Part 2) 86). Thus, instead of attaching importance to the omission of the words "annual or periodical," Congress assumed that the same income was covered with or without the addition of those words. The words "annual or periodical" may perhaps have been used merely to make it more plain that income from sales, which usually involve problems of basis, was excluded. It would seem clear enough, in any event, that the legislative history of Section 211 (a) (1) (A), and particularly the Congressional intent in 1936, to relieve nonresident aliens such as taxpayer only of the tax on capital gains, is sufficient to preclude the conclusion that lump sum royalties should be treated as sales rather than as royalties.[5]

The pertinent case history is in accord with the legislative intent. In *Sabatini* v. *Commissioner,*

[5] It seems of little significance that, as taxpayer states (Br. 13–14), at the time Section 211 (a) (1) (A) was passed the Circuit Court of Appeals for the Second Circuit had not yet reversed that part of *Sabatini* v. *Commissioner*, 32 B. T. A. 705, in which the Board of Tax Appeals, *sub silentio*, disapproved of I. T. 2735, *supra*, a 1933 administrative ruling that lump sum payments for serial and motion picture rights are taxable as royalties and not sales. Similarly, the other administrative rulings cited by taxpayer (Br. 15–16), all of which were prior to I. T. 2735 except one, add nothing worthy of discussion.

98 F. (2d) 753 (C. C. A. 2d), it was held that a lump sum royalty was taxable as a royalty, not as a sale, under Section 119 (a) of the Revenue Act of 1928, which is substantially identical to the present Section 119 (a) of the Internal Revenue Code. *Commissioner* v. *Raphael,* 133 F. (2d) 442 (C. C. A. 9th), certiorari denied, 320 U. S. 735, held that a lump sum for interest included in a judgment for the fraudulent sale of land was taxable under Section 211 (a) (1) (A). In that case the court specifically rejected the taxpayer's contention that the statute applied only to income paid periodically. And see *De Nobili Cigar Co.* v. *Commissioner,* 143 F. (2d) 436 (C. C. A. 2d). The cases relied upon by taxpayer (Br. 6–7) are not in conflict with either these decisions or the decision below. *Commissioner* v. *Celanese Corp.,* 140 F. (2d) 339 (App. D. C.), and *General Aniline & Film Corp.* v. *Commissioner,* 139 F. (2d) 759, decided by the court below and explained in its opinion in this case (R. 37), each involved a sale and not a royalty use. *Goldsmith* v. *Commissioner,* 143 F. (2d) 466, certiorari denied, 323 U. S. 774, also decided by the court below, involved a different statute and has no important bearing on this case. (See opinion below, R. 38.)

There is no occasion for review of this case by the Court on the basis of taxpayer's assertion that uncertainty and possible conflict are created by the "warning," which taxpayer concedes "may

be only a solemn dictum" (Br. 17), in footnote 15 of the opinion below that the opinion of the court below in the *General Aniline* case "should not be deemed an unshakable precedent" in respect of the taxability of purchase price payments contingent on future profits (R. 37, fn. 15). Aside from the fact that the court's statement does not even constitute a holding one way or the other, the point is not involved in the instant case.

In conclusion, it should be noted that the tax on the $10,000 involved here was paid through withholding at source, apparently by taxpayer's literary agent. (See Statement, *supra,* p. 5.) This fact is inconsistent with, and indicates the lack of merit in, taxpayer's assertions that the decision below introduces confusion in respect of the coverage of Section 211 (a) (1) (A).

CONCLUSION

The decision below is correct and involves no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1946.

APPENDIX

Internal Revenue Code:

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.—(a) *Gross income from sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

* * * * *

(4) *Rentals and royalties.*—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property; and

(5) *Sale of real property.*—Gains, profits, and income from the sale of real property located in the United States.

(6) *Sale of personal property.*—For gains, profits, and income from the sale of personal property, see subsection (e).

* * * * *

(26 U. S. C. 1940 ed., Sec. 119.)

SEC. 143 [As amended by Sec. 5 of the Revenue Act of 1940, c. 419, 54 Stat. 516]. WITHHOLDING OF TAX AT SOURCE.

* * * * *

(b) *Nonresident aliens.*—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and

employees of the United States, having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 15 per centum thereof, * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 143.)

SEC. 211 [As amended by Sec. 4, Revenue Act of 1940, *supra*]. TAX ON NONRESIDENT ALIEN INDIVIDUALS.—

(a) *No United States business or office*—(1) *General rule*—(A) *Imposition of tax.*—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an

> office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, * * *.
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> (26 U. S. C. 1940 ed., Sec. 211.)
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> SEC. 212. GROSS INCOME.
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> (a) *General rule.*—In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States.
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> (26 U. S. C. 1940 ed., Sec. 212.)

Treasury Regulations 103, promulgated under the income tax provisions of the Internal Revenue Code:

> SEC. 19.119–5. *Rentals and royalties.*—Gross income from sources within the United States includes rentals or royalties from property located within the United States or from any interest in such property, including rentals or royalties for the use of or the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other like property. The income arising from the rental of property, whether tangible or intangible, located within the United States, or from the use of property, whether tangible or intangible, within the United States, is from sources within the United States.

SEC. 19.143–2. *Fixed or determinable annual or periodical income.*—Only fixed or determinable annual or periodical income is subject to withholding. The Internal Revenue Code specifically includes in such income, interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emoluments. But other kinds of income are included, as, for instance, royalties.

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. A salesman working by the month for a commission on sales which is paid or credited monthly receives determinable periodical income. The share of the income of an estate or trust from sources within the United States which is distributable, whether distributed or not, or which has been paid or credited during the taxable year to a nonresident alien beneficiary of such estate or trust constitutes fixed or determinable annual or periodical income within the meaning of section 143 (b). The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income. Such items as taxes, interest on mortgages, or premiums on insurance paid to or for the account